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No. 10-301

Supreme Court, U.S.
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In The Supreme Court of the United States

ANASCAPE, LTD.,

Petitioner,

v.

NINTENDO OF AMERICA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its opposition, Nintendo posits a question different from the one presented, and then proceeds to explain why *its* question is not worthy of this Court's attention. Nintendo asks whether an appellate court may determine that admissible expert testimony is insufficient to support a jury verdict under Federal Rule of Civil Procedure 50. Opp. i, 2, 15. But of course an appellate court may so determine, as the petition notes. Pet. 12 n.4. The very different question actually presented – largely left unaddressed by Nintendo – is whether, on a Rule 50 sufficiency review, an appellate court may weigh admitted expert testimony, and disregard it as unsupported, in the absence of an objection under Federal Rule of Evidence 702. Pet. i.

Anascape's proposed answer to this question is simple: on a Rule 50 sufficiency review, expert testimony should not be discredited on Rule 702 grounds absent a timely Rule 702 objection. At least five circuits follow this approach; at least two circuits do not. Pet. 9-15. Nintendo's opposition – directed as it is to a question different from the one presented – casts no doubt on the existence or significance of this split. Tellingly, Nintendo never challenges Anascape's showing that, had this suit arisen in the Tenth Circuit, the $21 million judgment would have been upheld. Pet. 16-17; Opp. 14-19. The Court should grant the writ to resolve this important issue on which the circuits are split.

ARGUMENT IN REPLY

I. *Brooke Group* And *Matsushita* Support Granting The Writ.

Nintendo first argues that the writ should be denied because, in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) and *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court has supposedly resolved the question presented. Opp. 11-14. Nintendo is wrong, for at least two reasons.

First, the question presented is whether, on a Rule 50 sufficiency review, an appellate court may weigh expert testimony – and determine whether the testimony itself has factual support – when that evidence was submitted to the jury with no admissibility objection under Rule 702 or *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[1] Neither *Brooke Group* nor *Matsushita* could have possibly resolved this question for a simple reason: those decisions predate both the 1993 issuance of *Daubert* and the 2000 amendment to Rule 702.

Daubert provided the ground-breaking holding that expert testimony must be reliable in order to be admissible under Rule 702. *Daubert*, 509 U.S. at 594-95. The subsequent rule amendment is less well-known, but equally important. In 2000, Congress changed Rule 702 to provide that expert testimony

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[1] Nintendo does not dispute that it failed to offer any Rule 702 objection with respect to Dr. Howe's priority-date testimony. Opp. 6-11.

should be submitted to the jury only when, among other things, "the testimony is based upon sufficient facts or data." FED. R. EVID. 702. As the accompanying committee notes explain, this

> amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion.

FED. R. EVID. 702 advisory committee's note.

Because neither *Brooke Group* nor *Matsushita* – nor *Daubert*, for that matter – could have accounted for the 2000 amendment to Rule 702, none of those cases should be understood as holding that an admissibility objection is unnecessary in order for an appellate court to determine that an expert's record testimony has an insufficient factual basis.[2]

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[2] *Daubert*'s statement that a district court "remains free to direct a judgment" when admissible testimony amounts to no more than a "scintilla of evidence" supporting a party's position is not inconsistent with the approach advocated by Anascape. *Daubert*, 509 U.S. at 595-96; Pet. 12 n.4. Neither does it provide cover for the Federal Circuit's holding in this case. The Federal Circuit did not find Dr. Howe's testimony admissible but nevertheless insufficient to support the verdict. It found Dr. Howe's testimony "not supported by any evidence at all." Pet. App. 14. If so, that testimony was inadmissible – and its foundation should have been challenged – under Rule 702. FED. R. EVID. 702. This is the holding of the cases from the Second, Fourth, Ninth, Tenth, and Eleventh Circuits cited in the petition. Pet. 9-12.

Second, even if *Brooke Group* or *Matsushita* could be read as generally resolving the question presented, the courts of appeals have not understood those decisions in that way. Both cases addressed predatory pricing claims under the Robinson-Patman Act, and the courts of appeals have applied the analysis in those cases only in the antitrust context. *See Brooke Group*, 509 U.S. at 242-43; *Matsushita*, 475 U.S. at 576, 606; *Rebel Oil Co., Inc.* v. *Atl. Richfield Co.*, 51 F.3d 1421, 1435-36 (9th Cir. 1995) (applying analysis "[i]n the context of antitrust law"); *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 969 (10th Cir. 1994) (applying analysis "[i]n this complex area"). Indeed, Nintendo cites seven circuit decisions applying either *Brooke Group* or *Matsushita*, Opp. 15-16 – and every-one is an antitrust case.[3]

Therefore, even if Nintendo were right to argue that *Brooke Group* and *Matsushita* have answered the question presented, that would only provide an additional reason to grant the writ – for the Court could then correct the misperception, currently ubiq-uitous in the circuit courts, that the analysis reflected in those cases is limited to the "complex area" of antitrust law. *See SCFC*, 36 F.3d at 969.

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[3] In addition to *Rebel Oil* and *SCFC*, Nintendo cites the antitrust cases *Bailey* v. *Allgas, Inc.*, 284 F.3d 1237, 1257 (11th Cir. 2002); *Virgin Atl. Airways Ltd.* v. *British Airways Plc*, 257 F.3d 156, 267-68 (2d Cir. 2001); *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999); and *Vollrath Co.* v. *Sammi Corp.*, 9 F.3d 1455, 1462 (9th Cir. 1993). Opp. 15-16.

II. The Circuits Are Split On The Question Presented.

In support of its argument that there is no circuit split, Nintendo identifies fourteen courts of appeals cases that, it suggests, "have followed this Court's analysis in *Matsushita* and *Brooke Group* by directing summary judgment or judgment as a matter of law notwithstanding expert testimony that, though admissible, is deemed insufficient to support a jury verdict." Opp. 15-16. As noted above, Nintendo mischaracterizes the question presented. The question is *not* whether record testimony may be deemed insufficient to support a jury verdict. Opp. i. That is certainly the case. Pet. 12 n.4. The question presented is whether testimony admitted without Rule 702 or *Daubert* objection may be weighed, and discredited, on a Rule 50 sufficiency review. Pet. i. Nintendo's fourteen cases fail to show that there is no circuit split on that question.

Only eleven of Nintendo's fourteen cases postdate *Daubert* – thus only those eleven could be relevant to showing a uniform approach regarding the treatment of expert testimony in the absence of a *Daubert* objection.[4] But of those eleven cases, only two involve

[4] The eleven post-*Daubert* cases cited by Nintendo include the seven cases listed in footnote 3 above, as well as *Waterman* v. *Batton*, 393 F.3d 471, 478 & n.8 (4th Cir. 2005); *United States* v. *City of Miami*, 115 F.3d 870, 873 (11th Cir. 1997); *Guinn* v. *AstraZeneca Pharms. LP*, 602 F.3d 1245, 1256-57 (11th Cir. 2010); and *Pace* v. *Capobianco*, 283 F.3d 1275, 1281 n.1 (11th Cir. 2002). The three pre-*Daubert* cases include *Alevromagiros* v.

(Continued on following page)

a Rule 50 sufficiency review – thus only those two, *SCFC* and *Vollrath*, could be relevant to showing a uniform approach regarding the treatment of expert testimony under Rule 50. Both of those cases, however, apply *Brooke Group* in the antitrust context, and both suggest that this analysis is cabined within that context. *See SCFC*, 36 F.3d at 969 ("In this complex area, the Court cautioned, 'Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.'"); *Vollrath*, 9 F.3d 1455, 1462 (9th Cir. 1993) (citing the same *Brooke Group* language).

Nintendo's non-antitrust cases also fail to support its argument. Of the eleven post-*Daubert* cases Nintendo identifies, only four arise outside of the antitrust context. None of these cases applies *Brooke Group* or *Matsushita*, and none involves a sufficiency review under Rule 50. And the cases are further distinguishable. In *Pace*, there was no expert testimony at all. *Pace*, 283 F.3d at 1278-80. In *Waterman*, the court unsurprisingly refused to credit a legal conclusion, offered in response to a summary judgment motion, "that Appellants' actions were unconstitutional." *Waterman*, 393 F.3d at 478 n.8. In *Guinn*, there was a Rule 702 objection, and the court found the proffered testimony inadmissible. *Guinn*, 602 F.3d

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Hechinger Co., 993 F.2d 417, 422 (4th Cir. 1993); *Calhoun* v. *Honda Motor Co.*, 738 F.2d 126, 131 (6th Cir. 1984); and *Washington* v. *United States*, 214 F.2d 33, 43 (9th Cir. 1954). Opp. 15-16.

at 1252-55. Similarly, in *City of Miami*, the court found the proffered testimony inadmissible, and held that the district "court erred in accepting it." *City of Miami*, 115 F.3d at 873.

None of these cases suggests that courts in the Second, Fourth, Ninth, Tenth, or Eleventh Circuits generally permit, on a Rule 50 sufficiency review, an appellate investigation into the factual basis of an expert's testimony in the absence of a corresponding admissibility objection. The cases cited in Anascape's petition, on the other hand, demonstrate that those circuits do require a Rule 702 objection in these circumstances. Pet. 9-12. In the absence of "a timely objection to this evidence at trial" in those circuits, an appellate court will be precluded from asking whether an expert's "testimony was . . . supported by a sufficient foundation." *See Questar Pipeline Co.* v. *Grynberg*, 201 F.3d 1277, 1289 (10th Cir. 2000). Comparing that approach with the one employed by the Federal Circuit in this case – determining, in the absence of a Rule 702 objection, that Dr. Howe's testimony was "not supported by any evidence at all," Pet. App. 14 – confirms the existence and significance of the circuit split on the question presented. *Compare also In re Joint E. & S. Asbestos Litig.*, 52 F.3d 1124, 1132-33 (2d Cir. 1995) (analyzing the basis of an expert's opinion constitutes "an inappropriate weighing of the credibilities" on a sufficiency review) *with Guile* v. *United States*, 422 F.3d 221, 227 (5th Cir. 2005) (analyzing "the basis of the expert's opinion" is necessary on a sufficiency review). Pet. 9-15.

Nintendo attempts to distinguish the authority cited in the petition on the ground that, in this case, "the Federal Circuit did not rule Dr. Howe's testimony inadmissible; it simply ruled that the record, *including* his testimony, was insufficient to permit a verdict for Anascape." Opp. 17, 18. But that is not what happened. The district court found that Dr. Howe "provided extensive testimony" on the priority date issue that "supported the jury's finding, so long as the jury believed that testimony." Pet. App. 29-30. The Federal Circuit did not – indeed, could not – disturb that finding. That is, it did not hold that Dr. Howe's testimony, if credited, was nevertheless insufficient to support the verdict. It held instead that Dr. Howe's testimony was not credit worthy. Pet. App. 14-18.

In fact, the Federal Circuit held that Dr. Howe's testimony was "not supported by any evidence at all." Pet. App. 14. Expert testimony "not supported by any evidence" is undoubtedly inadmissible under Rule 702. FED. R. EVID. 702. The Federal Circuit in this case thus discredited Dr. Howe's testimony on Rule 702 grounds, in the absence of a Rule 702 objection, on a Rule 50 sufficiency review. That is precisely the approach precluded by the cases from the Second, Fourth, Ninth, Tenth, and Eleventh Circuits cited in the petition, but permitted by the cases from the Federal and Fifth Circuits cited in the petition. Pet. 9-15.

There is therefore a circuit split on the issue presented, and it is an important and potentially

case-dispositive one. Indeed, Nintendo never challenges Anascape's showing that, had this suit arisen in the Tenth Circuit, the $21 million judgment would have been upheld. Pet. 16-17; Opp. 14-19. Furthermore, as shown in the petition, this split has been "percolating" for more than a decade, and it is ripe for resolution by the Court.[5] Pet. 16-17.

III. Four Additional Reasons Support Granting The Writ.

Nintendo's opposition fails to undermine any of the four additional reasons that the petition provides for granting the writ. Pet. 17-25; Opp. 19-23.

First, the approach reflected in this case conflicts with *Reeves* and *Joiner*. The Court held in *Reeves* that, on a Rule 50 sufficiency review, courts "should review all of the evidence in the record" but "may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150; Pet. 18-19. The

[5] Nintendo's assertion that Anascape did not argue a circuit split to the Federal Circuit is irrelevant – the Federal Circuit was bound to apply either its own law or the law of the Fifth Circuit to this appeal. Opp. 14. Nintendo's suggestion that neither the Fifth nor Federal Circuit has acknowledged its own conflicting approach to this issue also provides no reason to deny the writ. Opp. 19. Indeed, given the fact that the approach in the Fifth and Federal Circuits conflicts with this Court's holdings in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-51 (2000) and *General Electric Co.* v. *Joiner*, 522 U.S. 136, 141-43 (1997), it is perhaps not surprising that these circuits have failed to openly acknowledge the split. Pet. 18-20.

Federal Circuit improperly weighed Dr. Howe's testimony in this case – it explicitly examined the testimony's foundation and found it lacking. Pet. App. 14. Contrary to Nintendo's suggestion, precluding courts from discrediting expert testimony on Rule 702 grounds in the absence of Rule 702 objections will neither undermine *Brooke Group* and *Matsushita* nor "insulate an entire category of [patent] cases from review under Rule 50." Opp. 20, 22. It will simply make clear that parties wishing to have the basis of expert testimony examined on appeal must raise an objection on those grounds in the trial court. That approach is fair, and it ensures timely notice of the Rule 50 issues that might be addressed on appeal. Pet. 21-22.

The Court held in *Joiner* that admissibility decisions must be subject to an abuse-of-discretion standard on appeal. *Joiner*, 522 U.S. at 146; Pet. 19-20. Nintendo argues – in a footnote – that this case is "irrelevant" because the Federal Circuit "did not rule that Dr. Howe's testimony was inadmissible." Opp. 20 n.7. That argument, however, only demonstrates Anascape's point. The Federal Circuit did not *rule* that Dr. Howe's was inadmissible – it simply discredited that testimony after finding it "not supported by any evidence at all." Pet. App. 14. But of course expert testimony "not supported by any evidence" is inadmissible under Rule 702. In effect, therefore, the Federal Circuit reached an admissibility question that had not been preserved, and it did so without addressing or satisfying the abuse-of-discretion

standard required by *Joiner*. That approach is not fair, and it conflicts with both *Joiner* and *Reeves*. Pet. 18-20.

Second, as the Ninth Circuit has recognized, the threat of unfair ambush on appeal is real. *Marbled Murrelet* v. *Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996). Anascape was in fact ambushed in this case. Pet. 20-22. As the district court found, Anascape "provided extensive testimony" at trial on the priority-date issue that "supported the jury's finding, so long as the jury believed that testimony." Pet. App. 29-30. In the absence of any Rule 702 objection, Anascape had no reason to suspect that this testimony might subsequently be weighed and discredited on the ground that it was not "based upon sufficient facts or data." FED. R. EVID. 702. But that is precisely what happened. Pet. App. 14.

Third, the approach taken in this case improperly undercuts the evidentiary value of expert testimony. Pet. 22-23. Nintendo argues that the "fact that expert testimony must satisfy 'additional threshold requirements' under *Daubert* (Pet. 23) is a consequence of Federal Rule of Evidence 702." Opp. 21. Once again, this argument demonstrates Anascape's point. The difference in treatment between expert and other evidence is a function of Rule 702. In the absence of an objection under that rule, therefore, expert testimony submitted to the jury should be treated no differently than any other kind of evidence deemed appropriate for the jury's consideration. *See*

Reeves, 530 U.S. at 150; *Joiner*, 522 U.S. at 146; *Marbled Murrelet*, 83 F.3d at 1067; Pet. 23.

Fourth, the error in this case is particularly egregious because, in contrast to the predatory pricing questions at issue in *Brooke Group* and *Matsushita*, the dispositive question of fact in this appeal must be addressed and answered "from the perspective of a person of ordinary skill in the art." *Ariad Pharms., Inc.* v. *Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010). Dr. Howe provided "extensive testimony" from such a perspective, and it was submitted to the jury without objection. Pet. App. 29-30. That testimony should not have been discredited on appeal on grounds not raised in the trial court. Pet. App. 14; FED. R. EVID. 702. Nintendo argues that Anascape "does not deny" that Dr. Howe's testimony is subject to critical attack. Opp. 22. Such attack, however, necessarily constitutes a weighing of the admitted testimony, which *Reeves* forbids. In weighing and discrediting Dr. Howe's testimony along the lines of Nintendo's argument, Opp. 22; Pet. App. 14-18, the Federal Circuit ran afoul of *Reeves* and *Joiner*, and confirmed the split among the circuits in the treatment of expert testimony on a Rule 50 sufficiency review.

CONCLUSION

The petition for writ of certiorari should be granted.

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